IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

MICHAEL K. OMAN, **Plaintiff,** **vs.** **DAVIS SCHOOL DISTRICT, ET AL.,** **Defendants.**	**MEMORANDUM DECISION AND ORDER** Case No. 1:03CV57DAK

This matter is before the court on Plaintiff's Motion to Strike and for Order in Limine. The court held a hearing on the motion on February 19, 2004. Plaintiff was represented by Vincent C. Rampton, and Defendants were represented by Glen E. Davies. Having fully considered the motion and memoranda submitted by the parties and the facts and law relevant to this motion, the court enters the following Order.

I. BACKGROUND

Plaintiff was employed by Defendant Davis School District from 1982 until March 2003. Plaintiff held various positions in the district's Maintenance Division. While he was employed with the district, Plaintiff also owned and operated an electrical contracting business.

In the spring of 2002, the district contacted the Davis County Attorney's office regarding potential illegal conduct involved with Plaintiff allegedly working for his own company during

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his hours of employment with the District. Because the investigators concluded that Plaintiff was traveling to places other than maintenance sites during work hours, the school district suspended Plaintiff. State criminal charges were brought against Plaintiff for communications fraud, a third degree felony, in Second Judicial District Court for Davis County, State of Utah. A preliminary hearing was held in the criminal case on November 4, 2002, and, at the conclusion of the evidence, the judge bound the case over for trial.

The attorneys then negotiated a plea bargain. The Davis County Attorney's Office agreed to drop the felony charge to a misdemeanor and offered a plea to be held in abeyance. Plaintiff declined to sign the plea in abeyance because it admitted guilt and Plaintiff disputed the underlying facts. Upon the advice of counsel, Plaintiff agreed to sign the plea in abeyance if all references to guilt could be converted to "no contest,"which was done.

Plaintiff filed this action seeking recovery under 42 U.S.C. § 1983 and for breach of contract, breach of implied covenant of good faith and fair dealing, defamation, and intentional infliction of emotional distress. The Davis School District filed a Counterclaim against Plaintiff seeking recovery for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, unjust enrichment, and fraud. The School District's Counterclaim references and quotes portions of the no-contest plea.

DISCUSSION

I. Plaintiff's Motion to Strike and for Order in Limine

Plaintiff is moving, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, to strike paragraphs 20 through 22 of Defendant Davis School District's Counterclaim against him, and, pursuant to Rule 410 of the Federal Rules of Evidence, for an order in limine precluding all

evidence of the content of, or any discussions or communications concerning the no-contest plea in abeyance entered in Plaintiff's related state criminal action. Paragraph 20 of the Counterclaim makes reference to the no-contest plea in abeyance entered in the criminal action, Paragraph 21 recites paraphrased segments of the plea, and Paragraph 22 quotes from the plea.

Plaintiff argues that the District's reliance on the no-contest plea and any declaration made incident to a no-contest plea is inappropriate and inadmissible under Rule 410 of the Federal Rules of Evidence. Rule 410 provides, in relevant part, as follows:

> [E]vidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
> . . . .
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which results in a plea of guilty later withdrawn.

Fed. R. Evid. 410.

In *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216 (10th Cir. 2000), the plaintiff sued his former employer for wrongful discharge after entering a no-contest plea in a state court criminal proceeding for possession of marijuana. The plaintiff claimed that his termination for violating the company's anti-drug policy was against public policy and a breach of an implied employment contract. The plaintiff brought a motion in limine to exclude all evidence of the no-contest plea based on Rule 410 of the Federal Rules of Evidence.

The Tenth Circuit concluded that "we will not construe . . . Rule 410 . . . to allow an

employee to affirmatively prevent an employer from presenting the very evidence used as a basis for its termination decision. Such a result would unfairly hogtie the employer and lead the jury to believe that the employee's termination was groundless." *Id.* at 1220. The Tenth Circuit agreed with the district court that permitting the plaintiff "to proceed at trial unchecked by the realities of the circumstances leading to his termination is simply unjust and will not be permitted." *Id.* As to Federal Rule of Evidence 410, the court found that the no-contest plea was "not being admitted 'against the defendant.'" *Id.* Therefore, the court allowed the defendant employer to admit the content of the plaintiff's no-contest plea to defend the wrongful termination charge.

Defendants rely on *Rose* to argue that Plaintiff's no-contest plea is relevant as one of the factors upon which the District relied in discharging Plaintiff. Defendants argue that it was the results of the criminal investigation that initially caused the District to suspend Plaintiff without pay, pending completion of the criminal proceeding and the District's own investigation, and Plaintiff was not terminated until his plea had been entered.

The evidence shows that the District relied, at least in part, on Plaintiff's plea in determining to terminate Plaintiff's employment. His termination did not occur until after the plea was entered and the termination letter that the District sent to Plaintiff quotes from the plea. Therefore, the court concludes that, as in *Rose,* to the extent that the plea is being entered defensively by the District to explain the basis for Plaintiff's termination, evidence related to the plea--the plea itself, the associated statement, and the termination letter quoting the plea--are admissible, assuming that the proper foundation can be laid for the introduction of such evidence.

However, this case presents an additional question not presented to the *Rose* court. This court must determine whether to admit the plea and associated statements for purposes of proving the counterclaims Defendants assert against Plaintiff. With respect to the counterclaims, Plaintiff not only seeks to preclude the introduction of any evidence related to the no-contest plea, but also seeks to have the references to the plea stricken from the counterclaim. Plaintiff argues that to the extent that the District is asserting the plea in support of its counterclaim against him, the plea is being used against him in precisely the sense proscribed by Rule 410.

For purposes of the counterclaims, Defendants are asserting the evidence relating to the plea "against the defendant who made the plea." Nevertheless, Defendants argue that, at least for the portion of their counterclaim that seeks restitution, the plea is admissible because the plea itself states that Plaintiff will pay the District restitution in an amount to be set in the civil action. However, the plea states that Plaintiff agrees to pay restitution, "if any," as determined in the civil action. The use of the phrase "if any" shows that Plaintiff has not acknowledged that any restitution is warranted. More significantly, however, the use of the plea itself in order to prove the restitution counterclaim is asserting the plea "against" the defendant. The school district can prove its counterclaim without the use of the plea. At the time of trial, however, the plea could properly be used for impeachment purposes, if necessary. Nevertheless, at this time, the court concludes the evidence related to the plea is inadmissible under Rule 410 for purposes of Defendants' counterclaims, including the counterclaim for restitution. Accordingly, Plaintiff's motion to strike is also granted because the counterclaim references and quotes the plea.

The District claims that the statement made by Plaintiff in his no-contest plea is outside the bounds of Rule 410(3), which precludes introduction of any "statement made in the course of

any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas [guilty plea or no-contest plea]," because Rule 11 of the Utah Rules of Criminal Procedure is not a comparable procedure. Defendants assert that Utah Rule 11 is fundamentally different than the federal Rule 11 because the Utah rule requires a factual basis for a no-contest plea to be admitted whereas there is no factual basis requirement for a no-contest plea in federal court. Because a no-contest plea requires a factual basis in state court, Defendants argue that it is more akin to a guilty plea in federal court and should be admissible.

Rule 410(3) refers to a "comparable" state procedure, not an identical state procedure. The court concludes that the state procedure is comparable. Although the state rule requires a factual basis for entry of a no-contest plea, the necessary factual basis can be established by an admission that the crime was actually committed by the defendant or, if the defendant refuses to admit culpability, by a showing "that the prosecution has sufficient evidence to establish a substantial risk of conviction." Utah R. Crim. P. 11(e)(4)(B). Because there is no requirement under the state rule that a defendant who pleads no-contest provide a factual admission to the crimes, the federal rule and state rule are not fundamentally different. Therefore, the court concludes that the Utah state procedures are comparable to Rule 11 of the Federal Rules of Criminal Procedure for purposes of Rule 410(3). Accordingly, the statements made in connection with Plaintiff's no-contest plea are inadmissible for purposes of Defendants' counterclaims unrelated to restitution.

Finally, Plaintiff argues that the underlying policy of Rule 410 precludes admission of the no-contest plea bargain or its contents where the result has been dismissal of charges. However,

this argument is at odds with the Tenth Circuit's decision in *Rose*, which found that an employer could rely on information concerning the plaintiff's conduct that it received before an expungement order became effective and present such evidence as it relied on in making its decision. 219 F.3d at 1221-22.

Therefore, the court concludes that the evidence relating to Plaintiff's no-contest plea is admissible for purpose of Defendants' defense. However, such evidence is inadmissible with respect to Defendants' counterclaims, and the court will give a cautionary instruction to the jury in this regard.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiff's Motion in Limine is GRANTED IN PART AND DENIED IN PART as set forth above and Plaintiff's Motion to Strike is GRANTED.

DATED this 4th day of March, 2004.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

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United States District Court
for the
District of Utah
March 5, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:03-cv-00057

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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